

OFCCP Publishes Final Standards on Systemic Compensation Discrimination and Voluntary Compensation Self-Audit Guidelines

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In today's Federal Register, OFCCP published final standards on systemic compensation discrimination, as well as final guidelines for voluntary self audits of compensation practices.

The final systemic discrimination standards outline the techniques OFCCP will use to evaluate contractors' pay practices during a compliance review. The final self-audit guidelines encourage contractors to self audit their pay practices through recommended self-audit methods. Both the final standards and final guidelines retain the major components of the proposed standards and guidelines, including the focus on comparisons of only "similarly situated" employees and the use of multiple regression analyses. In addition, OFCCP provided several important clarifications and modifications in response to contractors' comments on the proposed standards and guidelines.

As a practical matter, the publication of these final standards and guidelines indicate that OFCCP will return to aggressive investigation of contractors' pay practices during compliance reviews. **Contractors with pending compliance reviews and those who have been notified of additional audits this year should strongly consider assessing their compensation data through a privileged, statistical assessment.**

At the same time, contractors should be cautious about conducting statistical self analyses without appropriate guidance from legal and statistical experts. Plaintiffs' lawyers regularly look for and rely on internal self analyses to pursue class employment discrimination claims. If not properly developed, the analyses may be discoverable and can be quite damaging to the company's defense of class discrimination claims. Contractors should be particularly cautious about formally designating any classification or grouping as a "Similarly Situated Employee Group" (SSEG) without understanding the results of a compensation-based regression model which controls for the SSEG.

The Final Compensation Standards

The compensation standards retain the two fundamental components of the proposed standards: (1) rejection of the "pay grade" theory in favor of comparisons involving "similarly situated" employees; and (2) the use of multiple regression analyses to evaluate whether there are race- or sex-based pay disparities after controlling for the combined influence of multiple legitimate factors on compensation.

“Similarly Situated”:

Under the final standards, employees are “similarly situated” if they perform similar work, and occupy positions involving similar qualifications, skills, and responsibilities. The final standards continue to reject the pay grade theory and emphasize that employees who are not truly similarly situated under the standards should not be grouped simply to meet statistical size requirements. The final standards also recognize that factors in addition to job content, responsibility level, skills, and qualifications can be relevant to determining whether employees are similarly situated. These factors include “department or other functional unit . . . employment status (e.g., full-time versus part-time), compensation status (e.g., union versus non-union, hourly versus salaried versus commissions), etc.” The final standards clarify that the skills and qualifications involved in the performance of the duties of the position—rather than the incumbents’ particular skills and qualifications—are relevant to whether employees are similarly situated. In contrast, the particular qualifications and skills relied on by the employer may be explanatory factors used in a multiple regression analysis.

Multiple Regression Analysis:

The final compensation standards retain the use of multiple regression analysis to evaluate contractors’ pay practices. OFCCP responded to contractors’ concerns about the burden of multiple regression analysis by noting that: (1) OFCCP will use multiple regression analysis only at the end of a three-stage, tiered review process which relies on less complex analytical methods during the first two stages; and (2) OFCCP will not require contractors to maintain or develop personnel data in electronic format, but will take on the burden of such activities if necessary. OFCCP noted that it will not rely widely on “pooled” regression analyses, which aggregate dissimilar employees in a single regression, but will control for similarly situated status by adding a categorical or “dummy” variable in the equation. Where such pooled models are used, OFCCP will consider whether “interaction” factors should be included. The final standards also retain OFCCP’s policy not to exclude a factor, such as performance rating as “tainted” simply because the contractor determines the performance rating, unless there is specific evidence that the contractor discriminated when making performance decisions. Significantly, OFCCP agreed with contractors that legitimate factors affecting compensation may be qualitative or be otherwise incapable of quantification. OFCCP noted that it would consider such factors through an individualized assessment before drawing any conclusions from a regression analysis.

OFCCP’s New Processes for Investigating Compensation Practices During a Compliance Review:

The new standards outline the three-stage process for investigating compensation practices during a compliance review that OFCCP has begun implementing over the past two years: (1) An assessment of average differences in compensation data submitted by contractors in response to Item 11 of the Scheduling Letter; (2) a “cluster regression” analysis which evaluates 12 data items requested from contractors; and (3) a comprehensive investigation into contractors’ pay practices culminating in the development of a multiple regression analysis tailored to the contractors’ compensation practices. During the last stage, OFCCP investigators will interview employees, supervisors, managers, and HR and compensation personnel to determine which employees are similarly situated and what factors to include in the multiple regression analysis. OFCCP will also conduct interviews to develop anecdotal evidence of pay discrimination.

The Voluntary Self Evaluation Guidelines

OFCCP changed the name of the self-audit document to “Voluntary Guidelines” in response to commenters’ concerns that the guidelines would become a *de facto* enforcement standard. The final, “Voluntary Guidelines,” repeatedly emphasize that they are absolutely voluntary and are not intended to become in practice a compliance requirement. The final guidelines also emphasize that there are many different types of self audits which employers may reasonably use instead of the techniques discussed in the guidelines.

The final guidelines retain the “compliance coordination” incentive that OFCCP outlined in the proposed guidelines. Under this option, in exchange for conducting a self evaluation using the recommended methods, OFCCP will essentially defer to a contractor’s self-audit results, rather than conduct its own investigation into the contractor’s pay practices.

The recommended self-audit methods are generally the same as in the earlier proposed self-evaluation guidelines. OFCCP did, however, relax several requirements in response to contractors’ concerns: (1) contractors have to use multiple regression analysis for any facility with 500 or more employees (versus 250 employees); (2) the contractor must develop SSEGs of employees whose compensation will be compared; (3) the contractor may exclude up to 30% (versus 20%) of the employees who cannot be grouped into an SSEG without OFCCP scrutiny; and (4) the contractor must investigate any statistically-significant pay disparities to determine if they have legitimate, nondiscriminatory explanations. It must make appropriate pay adjustments where disparities cannot be explained. OFCCP also explained that contractors may use self-audit methods that encompass employees beyond a particular AAP.

OFCCP signaled that it will begin to ensure that contractors are performing some type of self audit of compensation practices, although it agreed that the self audit need not involve “analysis” (in response to a Morgan Lewis comment). The final guidelines also retain the Alternative Compliance Certification, under which the contractor need not submit a self-audit analysis to OFCCP in order to retain the attorney-client privilege and/or attorney work product protection.

Morgan Lewis will be issuing a White Paper next week, providing a comprehensive overview of the new OFCCP standards and guidelines and discussing their practical implications for contractors. In addition, we will also host a series of webcast workshops to help clients understand and respond to these new standards and guidelines.

We will host an interactive webcast session to discuss these recent OFCCP developments. [Click here](#) to register for a webcast session on Thursday June 22, 2006. Sessions will be held at 11:00 a.m. and 2:00 p.m. ET.

[Click here to view the notice](#): Office of Federal Contract Compliance Programs; Interpreting Nondiscrimination Requirements of Executive Order 11246 With Respect to Systemic Compensation Discrimination

[Click here to view the notice](#): Office of Federal Contract Compliance Program; Voluntary Guidelines for Self-Evaluation of Compensation Practices for Compliance With Nondiscrimination Requirements of Executive Order 11246 With Respect to Systemic Compensation Discrimination

For more information about this major OFCCP development, please contact one of the Morgan Lewis attorneys listed below.

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